No. 87

In the Supreme Court of the United States

OCTOBER TERM, 1957

JOSEPH GEORGE SHERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the Court of Appeals (R. 210–216) is reported at 240 F. 2d 949. A previous opinion in the case is reported at 200 F. 2d 880.

JURISDICTION

The judgment of the Court of Appeals was entered on February 4, 1957 (R. 217). The petition for a writ of certiorari was filed on March 4, 1957, and was granted on April 22, 1957 (R. 218). 353 U. S. 935. The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether, on petitioner's trial for narcotics violations, the issue of entrapment was properly sub-

mitted to the jury under proper instructions, or whether a verdict should have been directed for petitioner on that issue.

2. Whether, where the defense indicated in its opening statement and in cross-examination of prosecution witnesses that it was relying on the defense of entrapment, the government could properly prove petitioner's two prior narcotics convictions as part of its direct case.

STATEMENT

The first trial of petitioner in the United States District Court for the Southern District of New York resulted in a conviction for three sales of heroin (three counts) in violation of 21 U. S. C. 173 and 174. This conviction was reversed in *United States* v. *Sherman*, 200 F. 2d 880 (C. A. 2), because of erroneous instructions on the defense of entrapment. In the second trial, the jury found petitioner guilty on all three counts (R. 194). Petitioner admitted two previous federal narcotics convictions, and was sentenced to concurrent terms of imprisonment for ten years on each of counts 1, 2, and 3, with fines of $1.00 on each of these counts being remitted (R. 200). On appeal, the conviction was unanimously affirmed (R. 217).

The evidence at the second trial may be summarized as follows:

1. In May or June 1951, Charles Kalchinian, a drug addict, was arrested by an agent of the Federal Bureau of Narcotics for illegal sale of narcotics (R. 66–67, 26). Thereafter, by agreement, he served as a special employee or agent of that Bureau while at liberty on his own recognizance (R. 12, 67, 88–89, 99).

During the latter part of August 1951, Kalchinian by chance met petitioner at the office of a Dr. Grossman, who had a reputation for curing drug addicts (R. 68, 90, 91, 32). At first, Kalchinian and petitioner merely exchanged routine greetings and discussed their mutual experiences (R. 68, 91). Later, Kalchinian indicated that he was not responding well to treatment, and asked petitioner if he had a reliable man whom he (Kalchinian) could meet as a source for narcotics (R. 69, 94). Petitioner stated that he did know some people, but was generally non-committal regarding this inquiry (R. 69, 92). After several requests by Kalchinian to meet petitioner's contact, petitioner stated that this would be impossible since "the man was going out of business" (R. 69, 93, 94). Upon Kalchinian's asking how under these circumstances he could obtain narcotics, petitioner stated that he might be able to get them for Kalchinian (R. 70). When Kalchinian again asked petitioner for narcotics, petitioner replied that he was "working on it" (R. 70, 94).

Kalchinian inquired of petitioner as to how he could contact him if petitioner was going to procure narcotics. Petitioner suggested a procedure under which he would telephone Kalchinian at work "whenever he [petitioner] was ready." A certain street corner was designated as the meeting place, and petitioner would merely telephone, identify himself, and tell Kalchinian the hour to meet him (R. 70, 71). Petitioner stated that he would purchase $\frac{1}{16}$ ounce of heroin for $25 and sell one half of it to Kalchinian for $15, with the understanding that the additional

$2.50 should cover petitioner's taxi fare and expenses (R. 91–92, 108). About the first part of September, petitioner began telephoning Kalchinian about three or four times a week, and narcotics sales were made pursuant to these arrangements (R. 71). Toward the end of October, 1951, Kalchinian informed the government agents that he had found a person from whom he could purchase narcotics, and arrangements were made to make the "buys" for which petitioner was convicted (R. 71–74, 114).

On November 1, 1951 (count one), Kalchinian informed federal agent Melikian that he intended to purchase narcotics from petitioner later that day (R. 74, 12). Agents Melikian and Hunt searched Kalchinian to insure that he was not then in possession of any narcotics, and gave him $15 in government currency to make the "buy" (R. 12, 41, 74). Thereafter, Kalchinian met petitioner according to their arrangement, purchased a white substance enclosed in a small glassine envelope, and gave the agents a signal indicating the purchase by putting a newspaper in his pocket. The agents again searched Kalchinian, received from him the white powder, and found no currency on his person (R. 13, 41–43, 75). This procedure was repeated on November 7 (count two) (R. 14–15, 43–44, 76–77) and on November 16, 1951 (count three) (R. 15–16, 35–36, 78–79). Petitioner was arrested after the purchase on November 16, and the purchase money which had been given to Kalchinian on that date was found on petitioner's person (R. 16–17, 36–37). Upon subsequent laboratory

analysis, the substance purchased in each instance turned out to be heroin (R. 57–66).

Kalchinian testified that during the period between November 1 and November 16, 1951, he purchased other narcotics from petitioner without informing the agents of these sales (R. 75–76, 77–78). Except for the newspaper signal, all of Kalchinian's purchases from petitioner (other than those involved in the indictment) followed the same general pattern as the three purchases charged in the indictment (R. 79). Prior to his purchases from petitioner, Kalchinian had been buying his narcotics in the same quantities from another dealer, but for a lower price than he paid petitioner (R. 80–81, 116).

2. Petitioner did not testify on his own behalf, nor did he call any witnesses. In his counsel's opening statement to the jury (R. 202–204), however, it was emphasized that petitioner intended to rely upon the defense of entrapment as shown by the activities of the government agents and the government informer, Kalchinian. Pertinent parts of this opening statement are as follows (R. 202–203, 204):

> We intend to prove through the Government's own informer [Kalchinian] that this informer had been convicted for the sale of narcotics and to save himself from jail he decided to assist the Bureau of Narcotics and had the United States Attorney plead in his behalf when he appeared for sentence.
>
> We intend to show that this defendant was a narcotic addict who was up at a Dr. Grossman's office for a cure to get rid of this habit and so

this informer was also present for a cure. They met by accident, by chance.

This informer, building up cases for the Department of Narcotics, decided that he would dupe this defendant although this defendant was not willing and ready to perform the act, that he would induce this defendant, enfrap him into a division between them of narcotics for no profits whatsoever.

* * * * *

And we will show you that [narcotics sales by petitioner to Kalchinian] happened once, twice, three times, and during all this time this informer was in contact with the Bureau of Narcotics, taking a helpless addict who was at a doctor's office for a cure to rid himself of that habit, and inducing him against his will to violate the narcotics laws.

Then we will show you that the agents arrived at the scene and observed this pass of narcotics. The Government will show you that. * * *

* * * * *

This defendant would not be on trial today lady and gentlemen if it were not for the despicable actions of an addict, of an informer, who would jeopardize anybody's liberty, and it could have been anybody, in order to make a case for the Federal Bureau of Narcotics, because he was under an obligation. Just keep that in mind. This defendant was up at a doctor's office as an addict for a cure, being approached by this contemptuous, scurrilous informer who induced him after speaking to him a few times about getting narcotics so that they could divide it between them.

> Now, it is our contention that not having been a sale, and with the tremendous profit in narcotics, as you well know about, that this contemptible, scurrilous informer was out to frame this defendant, to induce him to commit the crime so he could come back to the Bureau of Narcotics and say, "Here I delivered another case for you in payment for my liberty."

In cross-examination of Kalchinian, defense counsel questioned at length in order to develop the contention that petitioner had been entrapped by Kalchinian into making the illegal narcotics sales (R. 92–97, 100, 103–104, 107–108, 112–116, 121). Such questions were asked as "So you had in mind, did you not, Mr. Kalchinian, to keep after this defendant in order to induce him to sell you narcotics?" (R. 94); "And it was your job, was it not, while you were working with these agents to go out and try and induce somebody to sell you narcotics, isn't that true?" (R. 100); "And you broached the subject [of narcotics sales] to this defendant, did you not, for the purpose of making a case against him?" (R. 114). In the cross-examination of agent Rudden, defense counsel inquired, "Were you interested in finding out whether Kalchinian entrapped this defendant into giving him some narcotics?" (R. 39). Agent Hunt was asked on cross-examination, "Did [agent] Melikian ever say to you 'We better see what kind of a fellow this Kalchinian is, to see whether he will frame people, induce people and violate the law unlawfully when they do not want to'?" (R. 45).

On the basis of defense counsel's opening statement and his cross-examination of government witnesses to develop the defense of entrapment, the government, as part of its case-in-chief, showed (over defense objections) that petitioner had been convicted of selling opium in 1942 and of possessing narcotics in 1946 (R. 136–138, 180, 187; Gov. Ex. 10, 11). Under the 1942 conviction, petitioner was sentenced to imprisonment for 18 months and a $1.00 fine which was remitted (Gov. Ex. 10; R. 205–206). Under the 1946 conviction, he was given a suspended sentence, was placed on probation for two years subject to the condition that he surrender himself to the United States Public Health Service Hospital in Lexington, Kentucky, until cured of the drug habit; he entered this hospital on March 10, 1947 (Gov. Ex. 11; R. 206–208).

3. The court instructed the jury on the issue of entrapment in pertinent part as follows (R. 188–189):

> The defendant in addition to his plea of not guilty has offered testimony by way of cross examination which, if believed by you, would constitute the defense of entrapment.
>
> It is undoubtedly true that the creation by the Government employee of the opportunity or facility for the commission of a crime does not defeat the prosecution. Artifice and stratagem can be employed to catch those engaged in criminal enterprises. The appropriate object of this permitted activity is to reveal a criminal design, to expose illicit traffic and other offenses, and thus disclose would-be violators of the law.
>
> But when the criminal design originates with Government officials or employees and they im-

plant in the mind of an innocent person the disposition to commit an alleged offense and induce its commission in order that they may prosecute, then in such an event a defendant cannot be found guilty but must be aequitted, and this is so because the defendant is entrapped into committing a crime, and that shocks public decency.

So in this case, concerning the defendant's contention that he was entrapped by the Government employees and hence not guilty of the crimes here charged, there are two questions of fact that you must decide:

1. Did Mr. Kalchinian, the Government special employee, induce the defendant to commit the offenses charged in the indictment?

2. If he did was the defendant ready and willing, without persuasion, and was he awaiting any propitious opportunity to commit the offenses?

On the first question: that is, the inducement, the defendant has the burden of proof. On the second question, the defendant's willingness or predisposition, the burden is on the Government.

And bear in mind that even if you believe that the defendant has been previously convicted of narcotics, the defendant may still have been induced and entrapped to commit the crime charged here. And if you find that to be so you must acquit the defendant despite his previous convictions.

In short, on this issue of entrapment, if you believe that the defendant was induced by Kalchinian to commit the offenses charged in the indictment, you must acquit unless your find

that the Government has sustained its burden of proving that the accused was ready and willing without persuasion, and was waiting for a propitious opportunity to commit the offense.

SUMMARY OF ARGUMENT

I

The evidence did not show entrapment as a matter of law, so as to warrant granting petitioner's motion for acquittal. Rather, the evidence permitted the inference that petitioner was ready and willing to commit the offense charged; and that the government's inducement merely provided the means for realization of his pre-existing purpose. The government informant was not the one who made the initial suggestion that petitioner *sell* or *furnish* narcotics. The informant merely asked that petitioner help him get to a source of supply, *i. e.*, give him a "contact." It was petitioner who undertook to do the supplying himself—and for a good price. This fact, together with the background of petitioner's prior convictions and the evidence of his well-organized plan, his readiness without urging to make frequent sales, and his high prices, support the conclusion of the jury that there was no entrapment. The evidence justified the finding that petitioner had, from the start, been a willing dealer in narcotics whose initial hesitancy in acceding to requests stemmed either from caution, or from the fact, which his statements suggested, that he was in the process of finding a new source of supply when the informant's first request was made.

On this evidence—coupled with the court's charge as to which no exception is taken—the issue was properly submitted to the jury. *Sorrells* v. *United States*, 287 U. S. 435, 451.

II

A. Previous convictions for offenses similar in nature to that charged in an indictment are admissible in rebuttal to negative entrapment where the defendant raises the entrapment issue. The fact that petitioner did not raise this issue by his own defense evidence—he introduced no evidence at all—does not render the prior convictions inadmissible since petitioner's counsel unequivocally introduced the entrapment defense in his opening statement, and in his cross-examination of the government's witnesses. Proof of prior convictions is admissible as part of the prosecution's case-in-chief where it is clear, as here, that the defense of entrapment will be invoked. Contrary to petitioner's argument, the introduction of his prior convictions did not compel him to take the stand and thus to furnish evidence in violation of his constitutional right against self-incrimination. When he chose to rely upon entrapment as his main issue, he simply assumed the risk that the Government would prove his prior convictions in order to negative that defense.

B. The previous convictions were not too remote to show the necessary criminal predisposition and design. The time interval between the previous convictions and the current offenses goes to the weight to be accorded by the jury to the convictions, not to their admissibility. Although the existence of a fairly sub

stantial period of time between prior offenses and the present one permits the inference that petitioner may have reformed, it also warrants the inference that he gained in cunning at concealing his activities as a result of his previous convictions, or that for part of the time he was unable to carry on illegal activities because of incarceration or hospitalization in the federal institution at Lexington. The choice of inferences was properly left to the jury for resolution.

ARGUMENT

I

THE ISSUE OF ENTRAPMENT WAS PROPERLY SUBMITTED TO THE JURY UNDER PROPER INSTRUCTIONS

As in *Masciale* v. *United States*, No. 84, this Term, the issue here is not what a court, sitting as a jury, might itself decide with relation to the evidence on entrapment. The issue is whether there was enough evidence from which a jury, faced with the task of resolving the issues presented by the evidence, could reasonably conclude that there had been no entrapment. In this case, while the evidence may be said to be subject to two possible interpretations, one sustaining and the other rejecting the defense of entrapment, the decision of the jury that the evidence established beyond a reasonable doubt that there had been no entrapment is fully supported by the record. The issue is purely one of fact, and the jury decided it on adequate evidence.[1]

[1] Petitioner does not challenge the trial court's instructions (*supra*, pp. 8–10). See Pet. 1–2; Pet. Br. 14–20.

As discussed in more detail in our brief in No. 84, the basic issue with respect to entrapment is "whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials". *Sorrells* v. *United States*, 287 U. S. 435, 451. It is not enough to make out the defense to show that the particular offense was committed at the instance of a government agent. If the evidence reveals "an existing course of similar criminal conduct; the accused's already formed design to commit the crime or similar crimes; [or] his willingness to do so, as evinced by ready complaisance", the inducement will not support the defense of entrapment. *United States* v. *Becker*, 62 F. 2d 1007, 1008 (C. A. 2).

This record contains sufficient evidence to go to the jury on this question of entrapment. The evidence does not even show that Kalchinian, the informant, made the initial suggestion that petitioner should *sell* or even *furnish* narcotics. The testimony of Kalchinian was that he asked petitioner if the latter could introduce him to a man from whom Kalchinian could get narcotics, *i. e.*, supply a "contact." It was *petitioner* who said that he would call Kalchinian when he was ready and who decided to make the sales himself. Only a very short interval of time elapsed between Kalchinian's initial requests during the latter part of August, 1951, and the inception of the regular illicit sales by petitioner in the first part of September. *Supra*, pp. 3–4. When he was ready to proceed, petitioner had a well-developed plan for clandes-

tine delivery. For a period of over two months, he furnished narcotics to Kalchinian with regularity and frequency, arranging for the continuous flow of sales without any special urging from Kalchinian. *Supra*, pp. 3–5. Petitioner's refusal from the start to mention any possible sources, his statement that his "man" was going out of business, his decision to call Kalchinian, his course of always making the sales himself, his well-organized plan for sale and delivery, his high prices, all justify the inference that he was not, as he suggests, a reformed character, led into evil by sympathy for a fellow-addict. Rather, particularly against his background as a prior dealer, this evidence suggests the activity of a narcotics seller, who had learned by experience to be careful but who was still ready and willing to make sales for profit when the opportunity arose.

The only facts that can be said to support the claim of entrapment are that petitioner met Kalchinian at a doctor's office and that he did not immediately sell him narcotics when first requested to furnish a "contact." As to the first point, petitioner's presence at the doctor's office is not necessarily proof that he was attempting to cure his own addiction and rehabilitate himself. It could as reasonably be inferred that he went to the doctor's office as a place where he would find potential customers. In any event, this fact does not account for the evidence that he himself chose to *sell* to Kalchinian, *on a continuing basis*, and not merely to help Kalchinian make a purchase or "contact." This is not a case of one or two acts of

assistance, but of a regular and frequent series of sales at a good price, over a two-month period.[2]

As for petitioner's slight hesitancy before supplying narcotics, the evidence suggests at least two possible explanations. Two prior convictions would obviously cause petitioner to be careful. The court below rightly observed that the jury was justified in regarding the rather slight hesitancy which petitioner did evince as "no more than prudent caution on the part of an experienced trafficker in narcotics" (R. 213). No narcotics dealer could hope to remain in business for any length of time were he to accept new and unknown customers with no hesitancy whatsoever, and it must be remembered that Kalchinian was a complete stranger to petitioner prior to August, 1951. It is also possible that petitioner's statement to Kalchinian that his source had gone out of business (*supra*, p. 3) was true, and that petitioner had to find a new source before he himself could be back in business. This possibility tends to reinforce, rather than negate, the conclusion that petitioner was at all times willing to engage in the narcotics traffic. His hesitancy in acceding to the request may have been merely the result of temporary inability to engage in business.

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[2] By way of contrast, see the fact situations in cases in which the evidence indicated that the defendant was merely assisting an addict, out of sympathy or friendship, to make a "contact" and obtain narcotics. *United States* v. *Sawyer*, 210 F. 2d 169 (C. A. 3); *United States* v. *Moses*, 220 F. 2d 166 (C. A. 3); *Adams* v. *United States*, 220 F. 2d 297 (C. A. 5).

The cardinal fact is that, after the initial delay, petitioner engaged in regular and frequent sales at high prices, pursuant to a well-planned arrangement. The jury was therefore justified in inferring that he was at all times a dealer engaged in the traffic for profit who welcomed Kalchinian as a customer when he was ready to supply that customer's needs.

Petitioner's predisposition to commit the offenses charged is also supported by the evidence of his two previous convictions for closely-related narcotics offenses. As long ago as 1942, he must have known that there was money to be made in the drug traffic and how to procure a supply, for his first conviction in that year evidences that he was in that business. Clearly he did not regard his first conviction as too high a price to pay, for in 1946 he was convicted of possessing narcotics. This is strong evidence that he had not changed his ways during the intervening period and was predisposed to commit the offenses charged in the present indictment.

II

PETITIONER'S PREVIOUS NARCOTICS CONVICTIONS WERE ADMISSIBLE AS PART OF THE GOVERNMENT'S CASE SINCE HIS COUNSEL, IN OPENING STATEMENT AND IN CROSS-EXAMINATION OF GOVERNMENT WITNESSES, HAD ALREADY INJECTED THE ENTRAPMENT DEFENSE.

A. It is not disputed that evidence of previous convictions for offenses similar in nature to that charged in an indictment is admissible in rebuttal in order to negative entrapment, where the defendant by his own evidence introduces that defense. Cf. *Carlton* v.

United States, 198 F. 2d 795 (C. A. 9); *Sherman* v. *United States*, 241 F. 2d 329, 332–333 (C. A. 9), certiorari denied, 354 U. S. 911; *United States* v. *Valdes*, 229 F. 2d 145, 147 (C. A. 2), certiorari denied, 350 U. S. 996.[3] Petitioner argues that, despite this principle, the evidence was erroneously admitted in his case since he did not take the stand or raise the issue of entrapment by his own defense evidence.

Petitioner's counsel, however, unequivocally injected the entrapment defense into the case in his opening statement[4] and in lengthy cross-examination of the government witness Kalchinian, and of agents Rudden and Hunt (see the Statement, *supra*

[3] The same rule applies as to evidence of previous criminal activities in the narcotics field, as distinguished from convictions. *E. g.*, *Gilmore* v. *United States*, 228 F. 2d 121, 122 (C. A. 5); *United States* v. *DeMarie*, 226 F. 2d 782, 785 (C. A. 7), certiorari denied, 350 U. S. 966; *United States* v. *Johnson*, 208 F. 2d 404, 406 (C. A. 2), certiorari denied, 347 U. S. 928; *Cratty* v. *United States*, 163 F. 2d 844, 851 (C. A. D. C.); *Mitchell* v. *United States*, 143 F. 2d 952, 957 (C. A. 10); *Swallum* v. *United States*, 39 F. 2d 390, 393 (C. A. 8); *Sancain* v. *United States*, 31 F. 2d 732, 733 (C. A. 8); *Nutter* v. *United States*, 289 Fed. 484, 485 (C. A. 4).

[4] Although an opening statement is admittedly not evidence, "* * * it is only fair to say that an opening statement should not have been made by counsel, if he did not expect to introduce evidence tending to substantiate it". *Lewis* v. *United States*, 11 F. 2d 745, 747 (C. A. 6); and see *People* v. *Stall*, 143 Cal. 682, 693–694; *State* v. *Olivieri*, 49 Nev. 75. While petitioner did not introduce evidence of entrapment as part of his own case—he did not produce any evidence at all—he did develop the issue in cross-examination of prosecution witnesses. Petitioner cannot contend that entrapment was not in the case for he argues at length in his petition for certiorari (Pet. 15–21) and in his brief here (pp. 14–20) that he has been entrapped. And that was the main issue in the Court of Appeals.

pp. 5–7). It is immaterial that the issue arose in that manner, rather than through petitioner's own testimony or that of defense witnesses. The important consideration is that the prosecution received the clearest of admonitions that the entrapment defense would be raised. That being so, the court below was correct in holding that "proof of prior convictions is admissible as part of the prosecution's case in chief where it is clear, as in the case before us, that the defense will be invoked" (R. 215). If the rule were otherwise, an accused by the simple expedient of mentioning the entrapment defense in his opening statement, expanding upon it through cross-examination of prosecution witnesses, and carefully refraining from raising the defense through his own evidence, could effectively prevent the prosecution from introducing evidence of his previous convictions of similar offenses no matter how closely related to the crime charged. Justice to a defendant does not require such a restriction on relevant evidence.

Although technically not rebuttal evidence since not given in reply to defense evidence proper, the prosecution's introduction of petitioner's two previous convictions was nevertheless, viewed realistically, in the nature of rebuttal to negative the entrapment defense as developed by petitioner's counsel's cross-examination of the prosecution witnesses.[5] The introduction of rebuttal evidence is a matter within the trial court's

[5] The evidence of prior convictions was introduced at the close of the government's case, after the cross-examination of Kalchinian and the agents. See Pet. Br. 13–14.

sound discretion.[6] In *Reece* v. *United States*, 131 F. 2d 186 (C. A. 5), certiorari denied, 318 U. S. 759, in which convictions for liquor law violations were affirmed, cross-examination of a disguised officer was such as to indicate that an entrapment defense would be raised. It was held (131 F. 2d at 188) that this "justified on redirect examination his testimony that he had disguised himself and undertaken to buy liquor in that vicinity by orders of his superiors in the Internal Revenue Department on information that numerous violations of the Revenue Laws were in progress there". So in the instant case, when cross-examination of prosecution witnesses disclosed a contention of entrapment, the government was properly permitted to introduce evidence negativing this defense, in its case-in-chief.[7] As this Court said in *Sorrells* v. *United States*, *supra*, 287 U. S. at 451–452, "if the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue. If in consequence he suffers a disadvantage, he has brought it upon himself by reason of the nature of the defense."

There was no violation of petitioner's rights under the Fifth Amendment. He was not compelled to give

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[6] *Goldsby* v. *United States*, 160 U. S. 70, 74; *United States* v. *Riccardi*, 174 F. 2d 883, 890 (C. A. 3), certiorari denied, 337 U. S. 941; *Williams* v. *United States*, 151 F. 2d 736, 737–738 (C. A. 4).

[7] This is an entirely different situation from that involved in *Neill* v. *United States*, 225 F. 2d 174, 179–180 (C. A. 8), holding that it was error to permit the prosecution to introduce evidence tending to negative entrapment, where the defendant had never raised this defense but in effect had disclaimed it.

testimony or to execute any document in violation of his constitutional right against self-incrimination. When he chose to rely upon entrapment, he assumed the risk—as the *Sorrells* opinion holds—that the government would prove the convictions in an effort to disprove his defense. Petitioner was protected by the court's charge that the previous convictions had been offered by the government only to show his disposition or willingness to commit the offense in relation to the entrapment issue, and that "even though you may find [petitioner] may have been convicted for narcotics previously, you may not and cannot find [petitioner] guilty because of those previous convictions of narcotics" (R. 187–188).

B. The previous convictions were not too remote to show criminal predisposition and design (see Pet. Br. 23–25). In both *United States* v. *Valdes*, 229 F. 2d 145 (C. A. 2), and *Carlton* v. *United States*, 198 F. 2d 795 (C. A. 9) (*supra*, pp. 16–17), a period of approximately three years had elapsed between the last prior narcotics conviction and the current offense, and yet no question of remoteness was raised. In *Trice* v. *United States*, 211 F. 2d 513, 519 (C. A. 9), certiorari denied, 348 U. S. 900, hearsay information as to the accused's narcotics activity in 1943 and 1944 was held admissible as tending to prove predisposition, so as to negative the defense of entrapment as to offenses committed in 1952; the court was of the opinion that "it does not appear that the evidence was remote to the degree that it was an abuse of discretion for the court to receive it". See also *Enriquez* v. *United States*, 188 F. 2d 313, 315, 316 (C. A. 9); *Mitchell* v. *United*

States, 213 F. 2d 951, 958 (C. A. 9), certiorari denied, 348 U. S. 912; *Kettenbach* v. *United States*, 202 Fed. 377, 383–384 (C. A. 9), certiorari denied, 229 U. S. 613.[8] Petitioner was sentenced to serve 18 months for the offense in 1942 (R. 205–206). He was not sentenced for the 1946 crime until 1947, and on that occasion was placed on two years' probation on condition that he enter the United States Public Health Hospital in Lexington, Kentucky, and stay there until cured of the drug habit. The judgment bears a certificate showing that petitioner did not enter the hospital until March 10, 1947 (R. 206–208). While incarcerated, the accused could not have engaged in the drug traffic as a regular business and these periods should certainly be excluded in determining the question of remoteness.

In any exent, the time elapsing between the previous convictions and the current offense should go to the weight to be accorded by the jury to the convictions, not to their admissibility. Cf. *King* v. *United States*, 144 F. 2d 729, 732 (C. A. 8); *Wolstein* v. *United States*, 80 F. 2d 779, 780 (C. A. 8). The existence of a fairly substantial period of time between prior offenses and the present one permits the inference that petitoner may have reformed. But it also warrants the inference that he gained in cunning and adeptness at concealing his activities as a result of his previous activities and convictions. This choice of inferences was properly left to the jury for resolu-

[8] In *Caldwell* v. *United States*, 78 F. 2d 282 (C. A. 4), cited by petitioner (Pet. Br. 24), there was a 10-year interval between the prior conviction and the offense charged.

tion. Despite the lapse of time, the previous convictions disclose that petitioner was no novice in the narcotics trade and support the conclusion that he was predisposed to commit the current offenses.

CONCLUSION

It is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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